No. 15-___

IN THE

Supreme Court of the United States

MOSES WILLIAMS,

Petitioner,

v.

THOMAS MACKIE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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NOVEMBER 17, 2015

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QUESTION PRESENTED

Under *Taylor v. Illinois*, 484 U.S. 400, 414-15 (1988), a court deciding whether to preclude testimony from a criminal defendant's alibi witness due to the breach of a discovery rule must consider whether the defendant's "fundamental" Sixth Amendment "right to offer the testimony of witnesses in his favor . . . outweigh[s] countervailing public interests" in favor of enforcement. The circuits have disagreed on the requirements of this balancing test, including on whether preclusion requires willful misconduct. Having previously taken a side on this split, the Sixth Circuit held in this case that the balancing test described in *Taylor* is no longer required after *Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (per curiam), which neither mentions nor purports to modify *Taylor*. The question presented is:

When may a trial court bar all testimony from a criminal defendant's alibi witness due to a discovery violation that is not willful?

PARTIES TO THE PROCEEDING

The sole petitioner below was Petitioner Moses Williams. The sole respondent below was Cindi Curtin, in her official capacity. Thomas Mackie, in his official capacity, is the Respondent before this Court.

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OPINIONS BELOW

The opinion of the Court of Appeals of Michigan is reported at 2006 WL 2000101. *See* Pet. App. 50a-58a. The Michigan Supreme Court's denial of further review is reported at 723 N.W.2d 843. *See* Pet. App. 49a.

The opinion of the United States District Court for the Eastern District of Michigan is reported at 2013 WL 625750. *See* Pet. App. 18a-48a. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 613 F. App'x 461. *See* Pet. App. 1a-17a.

JURISDICTION

The district court had jurisdiction over Petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2254. The Sixth Circuit had jurisdiction over Petitioner's appeal under 28 U.S.C. §§ 1291, 2253(a), and 2253(c)(3). The Sixth Circuit affirmed the district court's dismissal on May 27, 2015, and denied rehearing en banc on July 10, 2015. *See* Pet. App. 75a-76a.

This Court has jurisdiction under 28 U.S.C. § 1254(1). On September 28, 2015, this Court extended Petitioner's deadline for filing this petition to November 17, 2015.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution is included at Pet. App. 77a. 28 U.S.C. § 2254 is included at Pet. App. 78a-81a. Mich. Comp. Laws § 768.20(1) is included at Pet. App. 82a-83a.

STATEMENT OF THE CASE

This case concerns a criminal defendant's Sixth Amendment right to present witnesses as part of his defense and, specifically, asks when a trial court may preclude a defendant's alibi witness from testifying. This issue arose when a Michigan court ruled before trial that Petitioner Moses Williams could not call a witness who would have testified that Petitioner was in a different state on the date of the crime of which he stood accused. The court excluded Petitioner's alibi witness because the witness had telephoned the State's lead investigator 51 minutes after a prosecution-created deadline, and the court felt it was "time to pick a jury." Despite no physical evidence implicating Petitioner and significant credibility issues with the State's key witness, Petitioner—with no witness supporting his alibi—was ultimately convicted of second-degree murder.

A. Factual Background

On the afternoon of April 5, 2004, Edward Beasley was shot and killed in the front seat of a Cadillac sedan in Flint, Michigan. Based on eyewitness testimony, investigators initially linked an individual named Tommy Tiggs to the murder. Fingerprint evidence later confirmed that Tiggs had been in the car with Beasley. Weeks later, investigators identified Petitioner—who is Tiggs's cousin—as another suspect, because a cell phone associated with Petitioner was used by one of the perpetrators. Petitioner was eventually charged with second-degree murder, as well as with carrying a concealed weapon and possession of a firearm when committing a felony.

1. The Exclusion of Petitioner's Alibi Witness

Michigan law requires a felony defendant who intends to present an alibi witness to notify the prosecution "not less than 10 days before the trial of the case." Mich. Comp. Laws § 768.20(1). The necessary notice must include the witness's name and "the place at which the accused claims to have been at the time of the alleged offense." *Id.* No other information is required.

Petitioner's trial was scheduled to begin on Tuesday, December 7, 2004. Four days before then, Petitioner's trial counsel informed the court that an alibi witness, Kessa Peters, would testify that Petitioner was with her in Columbus, Ohio (roughly 250 miles from where the crime occurred) on the date of the shooting. *See* Pet. App. 62a-63a. Trial counsel learned about Peters during the summer but had not been able to confirm her willingness to testify until that morning. *Id.* He provided the court and the prosecution with Peters's name, date of birth, and city of residence. *Id.*

Although the prosecution was told more about Peters than Michigan law requires, *see* Mich. Comp. Laws § 768.20(1), this notice concededly came four days late.[1] The prosecution agreed not to protest this

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[1] Although § 768.20(1) requires notice ten days before trial, *see, e.g.*, *People v. Bennett*, 323 N.W.2d 520, 522-23 (Mich. Ct. App. 1982), Petitioner had two days longer because the ten-day deadline fell on a Saturday. *See* Mich. Comp. Laws § 8.6 (stating rules for deadline calculation). Petitioner's notice would have been timely under a previous version of the statute, which had

delay, however, so long as Peters contacted the police by 3:00 PM on Monday, December 6, 2004 (less than 24 hours before trial was set to begin). Pet. App. 62a, 67a.

According to the prosecution, Peters missed this deadline by 51 minutes. *Id.* at 67a-68a. She left a message for the police at 3:51 PM on December 6, as the prosecution told the court the next morning. *Id.* Acknowledging that Peters confirmed she would "testify that [Petitioner] was with her" on the date the crime was committed, the prosecution complained this was "not acceptable to us" because it "planned on taping" and then investigating Peters's account. *Id.* at 68a. The prosecution claimed that it had "no way of getting ahold of" Peters because she had no phone and had left no address. *Id.*

In response, Petitioner's counsel explained that Petitioner's mother and Peters "made attempts Friday and over the weekend to speak with" the police, and that Petitioner's mother spoke with the police on Monday regarding "parameters as to getting [Peters's] statement in." *Id.* at 68a-69a. Because Peters "would probably not be called until at least Thursday afternoon," Petitioner's counsel asked "that we be given that option" of attempting to address the prosecution's concerns. *Id.* at 69a.

The trial court, however, summarily denied Petitioner's request, stating only: "I don't see how I can continue, you know, playing the game, I'm sorry. This is the time to pick a jury, and so unless there's

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only a four-day deadline. *See People v. Merritt*, 238 N.W.2d 31, 32-33 (Mich. 1976).

something else, I'm gonna deny the request to add the witness." *Id.* The trial court did not ask whether any scheduling changes would mitigate the prosecution's concerns, did not consider any remedies short of flatly barring Peters's testimony, and did not make any other statements on the record about the preclusion of Peters's testimony.

2. The Evidence at Trial

The State's case against Petitioner rested largely on testimony by Carole Renee Cooper, the sole eyewitness to the crime. Cooper testified that, just after midnight on the date of the shooting, she and Beasley (the victim) were drinking and smoking cocaine while he arranged to sell a Cadillac in his possession. Trial Tr. at 768-71. According to Cooper, Beasley repeatedly referred to the prospective buyer as "T" and "his boy T," who Cooper confirmed was Tiggs. *Id.* at 793-94. Later that day, Cooper and Beasley drove the Cadillac to his sister's home, where he "call[ed] his boy so he could sell his car." *Id.* at 776. Some time afterwards, Beasley "call[ed] his boy again to see about the car." *Id.* at 777. Eventually, Beasley agreed to sell the Cadillac for $500. *Id.* at 778. He and Cooper drove the car to a meeting point but found no one waiting. *Id.* at 779-80. Noting that "my boy is down the street," Beasley drove further down the block. *Id.* at 780-81.

Cooper saw two people there: the individual she identified in court as Petitioner, and Petitioner's co-defendant Tommy Tiggs. *Id.* at 782-84. Cooper knew "Tom" from the neighborhood but did not know Petitioner. *Id.* She believed that Petitioner was the individual to whom Beasley referred as "my boy." *Id.*

According to Cooper, Beasley and Petitioner then began to negotiate the price of the car, after which Petitioner allegedly said, "we have to go down to my house . . . and get the money." *Id.* at 786-88.

The four parties then got into the car and began driving, with Beasley behind the wheel, Cooper in the front passenger seat, and Tiggs and the person Cooper identified as Petitioner in the back seat. *Id.* at 789. When they came to a stop, someone in the back seat—Cooper could not specify who—said, "Is you ready." *Id.* at 791-92. Tiggs then got out of the car, and Cooper heard a shot fired. *Id.* at 795. Cooper looked back and saw Tiggs trying to fire into the car but having trouble with his gun. *Id.* The person Cooper believed was Petitioner then got out of the car and began firing shots into it from behind. *Id.* at 799-801. At this point, Cooper ran from the scene. *Id.* at 805. Beasley was ultimately hit by three bullets and died from his wounds shortly after police reached the scene. *Id.* at 876, 1244.

After fleeing, Cooper called Germane Ross, a friend or cousin of Beasley's. Ross understood Cooper to say that the assailants had been "Little Tommy and Big Tommy," or Tommy Tiggs and his father—not Petitioner. *Id.* at 810-12. (Cooper offered conflicting testimony about whether she made this assertion and when, if at all, she corrected Ross's understanding.)

Two days after Beasley's murder, Cooper went to the police. *Id.* at 816-17, 843-44. After she was unable to describe the two assailants for purposes of a composite sketch, the police showed her photographs of individuals named "Tommy," and she identified Tiggs from among approximately 100 photographs.

Id. at 817, 1352-55. She testified that, seven weeks later, she identified Petitioner as the second assailant out of a photo lineup of only six individuals. *Id.* at 817-20, 844-46.

In addition to Cooper's testimony, the prosecution also introduced evidence intended to link Petitioner with the cell phone used by the person who arranged to buy the Cadillac. A representative from Cricket Communications, which had issued the phone, testified that the phone had been registered to Wanda Hawkins. *Id.* at 1319-20. Hawkins was the aunt of both Tiggs and Petitioner. *Id.* at 995. She testified that she had opened a cell phone account in her own name so that Petitioner could have a phone. *Id.* at 995-96. Cricket's records indicated that the phone was "Keon's phone" (referring to Petitioner's middle name). *Id.* at 1324. The Cricket representative testified, however, that there was no way to know whether it was Petitioner, Tiggs, or someone else who used that phone on the day of Beasley's murder. *Id.* at 1333, 1339-40.

As noted, Petitioner (who did not testify) insisted that he was in another state on the date of the crime. Because of the trial court's pre-trial ruling, however, no witness testimony supported Petitioner's alibi. On December 14, 2004, the jury found Petitioner guilty of second-degree murder, carrying a concealed weapon, and the felony-firearm charge.

3. State Appellate Proceedings

Petitioner timely appealed his conviction. He argued, in part, that his Sixth Amendment right to present a defense was violated when the trial court excluded the testimony of his alibi witness.

The Michigan Court of Appeals affirmed. *See* Pet. App. 50a-58a. The court rejected Petitioner's Sixth Amendment claim without reference to the federal constitutional standard. Instead, the court applied *People v. Travis*, 505 N.W.2d 563 (Mich. 1993), a non-constitutional state-law ruling that "articulated five factors to consider in" the enforcement of Michigan's notice-of-alibi rule: "'(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case.'" Pet. App. 52a.

The Michigan court found that the five *Travis* factors—which place no explicit weight on a defendant's constitutional right to present a defense[2]—supported the exclusion of Petitioner's alibi witness. After recounting the circumstances surrounding Petitioner's notice of his alibi witness, the court explained that "the prosecutor had no means of investigating the claimed alibi defense or ascertaining the details of Peters's testimony before she testified," and Petitioner "could have presented other witnesses or testified himself in support of his asserted alibi defense." Pet. App. 53a. Because the prosecutor was barred from

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[2] *Travis* concerned not a defense witness but instead a *prosecutorial* failure to provide notice of an alibi rebuttal witness. 505 N.W.2d at 565-66. The *Travis* factors were borrowed from a Fifth Circuit case that similarly addressed a *prosecutor's* discovery violation. *See United States v. Myers*, 550 F.2d 1036, 1043 (5th Cir. 1977).

"comment[ing] on [Petitioner's] failure to produce corroborating witnesses," the court held that Petitioner had not been denied "the opportunity to present a defense." *Id.* The court also added that the exclusion of Petitioner's alibi witness was proper because "other evidence properly admitted at trial tended to establish defendant's guilt." *Id.*

Petitioner timely petitioned the Michigan Supreme Court for leave to appeal. That petition was denied. *See* Pet. App. 49a.

4. Federal Habeas Proceedings

On August 6, 2009, proceeding pro se, Petitioner filed the present habeas petition, seeking relief under 28 U.S.C. § 2254 in part through the Sixth Amendment claim rejected by the Michigan Court of Appeals.[3]

The district court denied relief, concluding that the Michigan Court of Appeals' ruling was not "contrary to" and did not "involve[] an unreasonable application of" federal law. 28 U.S.C. § 2254(d)(1). The district court acknowledged that, in *Taylor v. Illinois*, 484 U.S. 400 (1988), this Court "held that before precluding a witness from testifying, courts *must balance* the defendant's right to call the witness against 'countervailing public interests,' which include 'the integrity of the adversary process, . . . the interest in the fair and efficient administration of justice, and the poten-

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[3] Petitioner's direct appeal exhausted this claim. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Having been directly appealed, the claim could not have been a basis for collateral relief under Michigan law. *See* Mich. Ct. R. 6.508(D)(2).

tial prejudice to the truth determining function of the trial process.'" Pet. App. 29a-30a (quoting *Taylor*, 484 U.S. at 414-15) (emphasis added). But the district court held that the Michigan court reasonably understood and applied this standard.

Agreeing that "Carole Cooper's identification of the petitioner was subject to question," the district court observed that "cell phone records put the petitioner in the same city as the shooting at the critical time, which would have undercut his alibi and potentiated the prosecutor's need to investigate" the alibi. *Id.* at 30a-31a. The district court accordingly concluded that the preclusion of Petitioner's alibi witness "was intended to vindicate the State's interest in the orderly conduct of a criminal trial." *Id.* at 31a (internal quotation marks omitted).

Petitioner timely appealed. After appointing counsel, the Sixth Circuit affirmed. Like the district court, the Sixth Circuit focused on whether the Michigan Court of Appeals' decision was "contrary to, or involved an unreasonable application of," this Court's decision in *Taylor*. *Id.* at 6a-7a (quoting 28 U.S.C. § 2254(d)(1)). Acknowledging Petitioner's "fundamental right to present witnesses in his own defense under the Sixth Amendment," the Sixth Circuit admitted that "the Michigan Court of Appeals opinion contains little explicit recognition of the importance of" that right. *Id.* at 8a, 11a. But the Sixth Circuit found that the Michigan court did not "completely ignore[]" the right. *Id.* at 11a. Instead, the Sixth Circuit discerned an "*implicit* recognition" of Petitioner's right—which it found in the Michigan Court of Appeals' recitation of the trial court (i) going along with "the prosecution's proposed accommodation"

(i.e., the 3 PM deadline), (ii) giving Petitioner's counsel "a final opportunity to address the court" before the alibi witness was formally excluded, (iii) noting that Petitioner could "testify and present other witnesses' testimony in support of the alibi defense," and (iv) barring the prosecution from commenting on Petitioner's lack of corroboration for his alibi. *Id.* at 11a-12a.

Although the state trial court did not consider sanctions short of preclusion, the Sixth Circuit opined that there was no need to do so. *See id.* at 12a. Nor, in the Sixth Circuit's view, did *Taylor* require the Michigan courts to balance Petitioner's Sixth Amendment right to present his defense against the interests favoring the preclusion of his alibi witness. *See id.* at 16a. *Taylor* itself states otherwise. *See* 484 U.S. at 414-15 (courts "must . . . weigh [specified interests] in the balance"). Indeed, most circuits have endorsed such a balancing test. *See infra* Part A. But the Sixth Circuit held that *Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (per curiam), "rejected" any rule that "a case-by-case balancing of interests [must] weigh[] in favor of enforcement." Pet. App. 15a. According to the Sixth Circuit, after *Jackson*, "*Taylor*'s holding, properly understood, teaches that various factors are *potentially* relevant in evaluating the appropriateness of the preclusion sanction" but "does not mandate interest-balancing." *Id.* at 16a (emphasis added). The Sixth Circuit accordingly affirmed the denial of habeas relief.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD CLARIFY THE STANDARD FOR WHEN THE SIXTH AMENDMENT PERMITS THE PRECLUSION OF A DEFENDANT'S ALIBI WITNESS.

This Court should grant certiorari to clarify when a trial court may permissibly bar an alibi witness from testifying, notwithstanding a defendant's fundamental "right to present his own witnesses to establish a defense." *Washington v. Texas*, 388 U.S. 14, 19 (1967). The circuits have divided on this question and overwhelmingly rejected the rule the Sixth Circuit adopted in this case. Moreover, the Sixth Circuit plainly misunderstood the test announced by this Court in *Taylor* to have been abrogated by *Nevada v. Jackson*. This Court should intervene to clarify *Taylor*'s continuing force.

A. The Circuits Are Split on Whether Witness Preclusion Requires the Interest in Enforcing a Discovery Rule to Outweigh a Defendant's Right to Present His Defense.

The circuits have diverged on the Sixth Amendment's protection of a defendant's right to present his defense. All agree that *Taylor* governs when a court may preclude a defendant's alibi witness, but there is a three-way split on when preclusion is permissible.

In this case, the Sixth Circuit held that, under *Taylor*, there is no need for a trial court to find "that the interests in favor of enforcement of a discovery rule . . . outweigh, or justify limitation of, the defendant's right to present a defense before the rule can be enforced to exclude" the defendant's alibi witness. Pet.

App. 15a. In the Sixth Circuit's view, although *Taylor* "teaches that various factors are *potentially* relevant in evaluating the appropriateness of the preclusion sanction," *Taylor* "does not mandate interest-balancing" between the defendant's and the State's interests. *Id.* at 16a (emphasis added).[4]

The First, Fifth, Seventh, Eleventh, and D.C. Circuits all disagree. In the First Circuit, when a defendant has violated a discovery rule, "the trial judge (in deciding which sanction to impose) *must weigh* the defendant's right to compulsory process against the countervailing public interests . . . ." *Chappee v. Vose*, 843 F.2d 25, 29 (1st Cir. 1988) (emphasis added); *see also United States v. Portela*, 167 F.3d 687, 705 (1st Cir. 1999). This rule that a court "must weigh" the competing interests against each other, *Chappee*, 843 F.2d at 29, cannot be squared with the Sixth Circuit's rule that "does not mandate interest-balancing," Pet. App. 16a.

Similarly, in the Fifth Circuit, when a defendant is threatened with preclusion due to a discovery violation, the "defendant's Sixth Amendment right to present witnesses . . . *must be weighed* against the countervailing interests in 'the integrity of the adversary process, . . . the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process.'"

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[4] In contrast, an older Sixth Circuit case, *Ferensic v. Birkett*, 501 F.3d 469 (6th Cir. 2007), endorsed an "interest-balancing" standard for witness preclusion. *See id.* at 475-76. But the Sixth Circuit in this case disavowed *Ferensic* on the basis of *Nevada v. Jackson*. *See* Pet. App. 16a n.3.

United States v. Mizell, 88 F.3d 288, 294 (5th Cir. 1996) (emphasis added) (second alteration in original) (quoting *Taylor*, 484 U.S. at 414-15). In the event of willful misconduct, preclusion is always appropriate. *See id.* Without a willful violation, a court must "consider whether" a defendant's "right *outweighed* the efficiency and fairness concerns cited in *Taylor*." *Id.* at 295 (emphasis added). Skipping this balancing test "violate[s]" the defendant's Sixth Amendment right. *Id.*

The Seventh, Eleventh, and D.C. Circuits have also understood *Taylor* to mandate the balancing test that the Sixth Circuit rejected below. *See, e.g.*, *Harris v. Thompson*, 698 F.3d 609, 634 (7th Cir. 2012) (*Taylor* prescribes a "balancing approach to determine whether exclusion of evidence as discovery sanction violated criminal defendant's compulsory process right"); *Tyson v. Trigg*, 50 F.3d 436, 444-45 (7th Cir. 1995) (same); *Horton v. Zant*, 941 F.2d 1449, 1466 (11th Cir. 1991) ("[T]he defendant's right to present testimony must be weighed against the state's need to enforce procedural rules and to conduct criminal trials in an orderly manner."); *United States v. Johnson*, 970 F.2d 907, 911-12 (D.C. Cir. 1992) (remanding because district court "did not articulate any application of the *Taylor* balancing test" when excluding defendant's two alibi witnesses).

In contrast to the above circuits, the Second, Eighth, and Ninth Circuits focus on the willfulness of a defendant's conduct, in light of *Taylor*'s approval of preclusion for "willful" discovery violations "motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evi-

dence." 484 U.S. at 415. The Ninth Circuit has held that preclusion is *only* ever warranted in this circumstance. *See, e.g.*, *United States v. Finley*, 301 F.3d 1000, 1018 (9th Cir. 2002); *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991). The Eighth Circuit has also held that preclusion requires a willful discovery violation. *See Anderson v. Groose*, 106 F.3d 242, 246 (8th Cir. 1997) (holding that state trial court erred in excluding defense witness's testimony because "[n]o court in this case has found, nor is there anything in the record to indicate, that trial counsel was willful in her noncompliance with the discovery rules").[5] Similarly, the Second Circuit has held that, when "less onerous sanctions (such as an adjournment)" are possible, only "a finding of willfulness [can] justify the exclusion" of a defendant's witness. *Noble v. Kelly*, 246 F.3d 93, 100 (2d Cir. 2001) (per curiam).

That is not to say that only the Sixth Circuit has permitted preclusion regardless of whether enforcement interests outweigh the defendant's Sixth Amendment right. The Tenth Circuit has held the same. In *United States v. Russell*, for example, the Tenth Circuit held that a Sixth Amendment challenge to witness preclusion due to delayed disclosure should turn on "(1) the reason for the delay; (2) whether the delay prejudiced the other party; and (3)

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[5] In other cases, the Eighth Circuit has endorsed a balancing test like that rejected below, under which the defendant's Sixth Amendment right is "weigh[ed] . . . against countervailing public interests." *United States v. Ladoucer*, 573 F.3d 628, 635 (8th Cir. 2009); *see also United States v. Sparkman*, 500 F.3d 678, 682 (8th Cir. 2007) (same).

the feasibility of curing the prejudice with a continuance." 109 F.3d 1503, 1510-12 (10th Cir. 1997) (citing *Taylor*). Borrowed from case law on Fed. R. Crim. P. 16(d)(2) (the federal rule on discovery violations), this test gives no explicit weight to a defendant's Sixth Amendment right. *See id.* In other cases as well, the Tenth Circuit has rejected Sixth Amendment claims by exclusively focusing on the prejudice to the State, without reference to a defendant's right to present his defense. *See, e.g.*, *Watley v. Williams*, 218 F.3d 1156, 1159 (10th Cir. 2000); *United States v. Nichols*, 169 F.3d 1255, 1267-68 (10th Cir. 1999).[6]

In short, most circuits have held that, for evidence to be precluded under *Taylor*, enforcement interests must outweigh a defendant's Sixth Amendment right to present his defense. The Second, Eighth, and Ninth Circuits have held that this requires willful misconduct by the defendant, whereas other circuits have called for a balancing test that need not turn on willfulness. The Sixth Circuit flatly rejected any such test in this case, however, and the Tenth Circuit has also ignored the defendant's right to present a defense. These approaches cannot be reconciled. This Court's review is needed to bring uniformity to the circuits' applications of *Taylor*.

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[6] In other cases, the Tenth Circuit has suggested a balancing test like what the Sixth Circuit rejected below. *See Young v. Workman*, 383 F.3d 1233, 1239 (10th Cir. 2004); *Short v. Sirmons*, 472 F.3d 1177, 1186 (10th Cir. 2006).

B. The Sixth Circuit's Rule Misreads This Court's Precedents.

This Court's review is also needed because the Sixth Circuit misread this Court's recent per curiam decision in *Nevada v. Jackson* to abrogate *Taylor*. This holding cannot be squared with either decision.

Taylor addressed whether a trial court's refusal to allow a defense witness to testify, due to the defendant's violation of a pretrial discovery rule, "violated the [defendant]'s constitutional right to obtain the testimony of favorable witnesses." 484 U.S. at 402. The Court explained that it was "elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor." *Id.* at 414. At the same time, however, the Court made clear that "[t]he State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence." *Id.* at 411.

Under *Taylor*, to determine when enforcement interests should yield to a defendant's constitutional right, a court must consider whether the defendant's right "*outweigh[s]* countervailing public interests." *Id.* at 414 (emphasis added). In addition, "[t]he integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also *weigh in the balance*." *Id.* at 414-15 (emphasis added).

It is hard to imagine how *Taylor* could have more clearly directed courts sanctioning the late notice of an alibi witness to engage in interest-balancing. Indeed, before this case, the Sixth Circuit *itself* had endorsed such a balancing test. *See, e.g.*, *Ferensic v. Birkett*, 501 F.3d 469, 475-76 (6th Cir. 2007). In this case, however, the Sixth Circuit discarded that approach on the basis of *Nevada v. Jackson* and held that *Taylor*, "properly understood, . . . does not mandate interest-balancing." Pet. App. 16a. But *Jackson* did not address the exclusion of alibi testimony, the circumstance present in *Taylor*.

Instead, *Jackson* concerned a rape defendant's attempt to show that the police could not corroborate the victim's past accusations. The trial court had allowed cross-examination on the topic but not extrinsic evidence, in light of the defendant's failure to provide pretrial notice. The Ninth Circuit found a Sixth Amendment violation, citing *Michigan v. Lucas*, 500 U.S. 145 (1991)—which dealt with the permissibility of a similar rule that prohibited raising a rape victim's past sexual conduct. This Court reversed. The Court explained that *Lucas* "did not even suggest, much less hold, that it is unconstitutional to enforce *such a rule* unless a case-by-case balancing of interests weighs in favor of enforcement." 133 S. Ct. at 1993 (emphasis added). In the Sixth Circuit's view, this brief discussion in *Jackson* abrogated the balancing requirement set forth in *Taylor*. That is wrong, for several reasons.

"Needless to say, only this Court may overrule one of its precedents." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam) (reversing ruling that doubted whether this

Court's older precedent was "still good law"). And *Jackson* does not even mention *Taylor*, much less purport to overrule or modify its rule.

To be sure, *Taylor* and *Jackson* do superficially disagree. For a court considering whether to preclude a defendant's evidence, *Taylor* requires asking whether the defendant's Sixth Amendment right "outweigh[s] countervailing public interests" in favor of enforcement, 484 U.S. at 414, whereas *Jackson* found no need for "a case-by-case balancing of interests [to] weigh[] in favor of enforcement," 133 S. Ct. at 1993. But *Taylor* and *Jackson* addressed different *types* of evidence.

Taylor, as noted, concerned the exclusion of a defendant's alibi witness. *See* 484 U.S. at 405-06. So does this case. *Jackson*, however, concerned a rule akin to the "widely accepted" rule that extrinsic evidence of a witness's conduct is not admissible for impeachment. 133 S. Ct. at 1993. The *Jackson* Court stated that "case-by-case balancing" was not necessary when "enforc[ing] *such a rule*," the "constitutional propriety of [which] cannot be seriously disputed." *Id.* (emphasis added). That rule is not remotely analogous to prohibiting the direct testimony of an exculpatory alibi witness, when a defendant's right to present such witnesses "is a fundamental element of due process of law." *Taylor*, 484 U.S. at 409 (internal quotation marks omitted).

Concluding that *Jackson* nonetheless abrogated *Taylor*, as the Sixth Circuit did, is particularly indefensible when *Jackson* was only a per curiam decision. Given that such decisions "rendered without full briefing or argument" are entitled to less prece-

dential weight, *Hohn v. United States*, 524 U.S. 236, 251 (1998), any tension between *Jackson* and *Taylor* only underscores the need for this Court's review. If nothing else, the Court should summarily reverse the Sixth Circuit in order to make clear that *Jackson* did not implicitly overrule *Taylor*.

C. This Question is Important and Needs This Court's Attention.

The question of when the Sixth Amendment permits the preclusion of a defendant's alibi witness is important and warrants this Court's attention.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor*, 484 U.S. at 409. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense." *Washington*, 388 U.S. at 19. This right is crucial to "due process of law," *id.*, and, indeed, is "an essential attribute of the adversary system itself." *Taylor*, 484 U.S. at 408.

This Sixth Amendment right is especially important in the context of a defendant's alibi. Few things matter more to the defense of an accused than *affirmative* evidence—beyond simply the defendant's word—that he could not have committed the crime (because, for example, he was somewhere else at the time). Precluding such evidence should not be done lightly. The Fifth Amendment prohibits rulings that unduly "cast[] a heavy burden on a defendant's otherwise unconditional right not to take the stand." *Brooks v. Tennessee*, 406 U.S. 605, 610-11 (1972). Moreover, the Fifth Amendment aside, a criminal

defendant's bare alibi testimony is inherently suspect in light of his obvious self-interest; supporting testimony strengthens an alibi immeasurably. The standard set forth in *Taylor* thus has special significance for alibi evidence.

And the possibility that such evidence might be barred due to delayed notice, as in this case, is widespread. Over forty states have notice-of-alibi rules similar to the rule at issue in this case, almost all of which authorize preclusion as a remedy.[7] The Federal Rules of Criminal Procedure are similar. *See* Fed. R. Crim. P. 12.1.

The law in most jurisdictions thus calls on trial courts to decide whether to preclude a defendant's

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[7] *See, e.g.*, Alaska R. Crim. P. 16(c)(5); Ariz. R. Crim. P. 15.2(b), 15.7(a)(1); Ark. R. Crim. P. 18.3, 19.7; Colo. Rev. Stat. § 16-7-102; Colo. R. Crim. P. 16(II)(d), (III)(g); Conn. Super. Ct. R. 40-21; D.C. Super. Ct. R. 12.1; Fla. R. Crim. P. 3.200; Ga. Code Ann. § 17-16-5; Haw. R. Penal P. 12.1; Idaho Code Ann. § 19-519; Ill. Sup. Ct. R. 413(d), 415(g); Ind. Code § 35-36-4-1, -3; Iowa R. Crim. P. 2.11(11)(a), (d); Kan. Stat. Ann. § 22-3218; La. Code Crim. Proc. art. 727; Me. R. Crim. P. 16A(b)(3); Md. R. Crim. P. 4-263(e)(4), (h)(2), (n); Mass. R. Crim. P. 14(b)(1); Minn. R. Crim. P. 9.02 subd. 1(5)(e), (7), 9.03 subd. 8; Miss. Unif. R. Cir. Cnty. Ct. P. 9.05; Mo. Sup. Ct. R. 25.05(A)(5), 25.18; Mont. Code Ann. §§ 46-15-323, -329; Neb. Rev. Stat. § 29-1927; Nev. Rev. Stat. § 174.233; N.H. Super. Ct. R. 100; N.J. Ct. R. 3:12-2; N.M. Dist. Ct. R. Crim. P. 5-508; N.Y. Crim. Proc. Law § 250.20; N.C. Gen. Stat. §§ 15A-905(c)(1), 15A-910; N.D. R. Crim. P. 12.1; Ohio R. Crim. P. 12.1; Or. Rev. Stat. § 135.455; Pa. R. Crim. P. 567; S.C. R. Crim. P. 5(e); S.D. Codified Laws § 23A-9; Tenn. R. Crim. P. 12.1; Utah Code Ann. § 77-14-2; Vt. R. Crim. P. 12.1; Va. Sup. Ct. R. 3A:11(c)(2), (g); Wash. Super. Ct. Crim. R. 4.7(b)(2)(xii), (h)(7); W. Va. R. Crim. P. 12.1; Wis. Stat. § 971.23(8); Wyo. R. Crim. P. 12.1.

alibi evidence due to a discovery violation. Whether that routine, yet fundamentally important, question turns on whether the government's enforcement interests outweigh the defendant's Sixth Amendment rights is greatly significant.

D. This Case is a Good Vehicle for Addressing the Question.

Finally, this case is a good vehicle for the question presented. The preclusion of Petitioner's alibi witness cleanly presents the question of which (if any) of the courts of appeals' various standards is correct for when such a sanction is permissible: Petitioner's violation of the discovery rule at issue was not willful (*see* Pet. App. 13a), and no court has ever balanced Petitioner's Sixth Amendment right against the State's interest in enforcing the rule. Thus, the preclusion of Petitioner's alibi witness was appropriate under only the Sixth Circuit's approach in this case, and not the other frameworks set forth above.

Respondent may claim that this case is a poor candidate for review because it is unpublished and nonprecedential. But this Court routinely reviews such rulings. *See, e.g.*, *Felkner v. Jackson*, 562 U.S. 594 (2011) (per curiam); *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538 (2010); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007); *Kane v. Garcia Espitia*, 546 U.S. 9 (2005) (per curiam); *Dye v. Hofbauer*, 546 U.S. 1 (2005) (per curiam); *United States v. Flores-Montano*, 541 U.S. 149 (2004). And, as a practical matter, Sixth Circuit panels routinely give significant weight to and base their rulings on unpublished precedent. *See, e.g.*, *United States v. Hentzen*, --- F. App'x ----, 2015 WL 4880150, at *6-7 (6th Cir. 2015); *Baker v.*

Stevenson, 605 F. App'x 514, 521 (6th Cir. 2015); *McKinnie v. Roadway Express, Inc.*, 341 F.3d 554, 557-58 (6th Cir. 2003); *Bob Tatone Ford, Inc. v. Ford Motor Co.*, 197 F.3d 787, 790 (6th Cir. 1999); *Oviedo v. Jago*, 809 F.2d 326, 328-29 & n.3 (6th Cir. 1987). Moreover, in this case, the Sixth Circuit issued a fourteen-page opinion (with a concurrence) that expressly cast doubt on its past cases in light of *Nevada v. Jackson*. *See* Pet. App. 16a n.3. It is difficult to imagine courts and litigants in the Sixth Circuit disregarding this decision simply because it is unpublished.

Finally, reversing the Sixth Circuit would make a difference in this case. Petitioner is entitled to relief because the Michigan Court of Appeals' decision "was contrary to . . . clearly established Federal law, as determined by" this Court. § 2254(d)(1). Specifically, "the state court applie[d] a rule different from the governing law set forth in" *Taylor* (as properly understood). *Bell v. Cone*, 535 U.S. 685, 694 (2002).[8] The Michigan court's reasoning focused almost exclusively on prejudice caused to the state, without considering the weight of Petitioner's Sixth Amendment right. And the result in the Michigan court similarly cannot be reconciled with *Taylor*. Petitioner did not willfully violate the rule at issue, and the timing of Petitioner's notice did not threaten "[t]he integrity of

[8] The disagreements discussed earlier do not preclude *Taylor* from being "clearly established Federal law." § 2254(d)(1). Although the circuits have not construed *Taylor* consistently, they have almost uniformly understood *Taylor* to embody the interest-balancing rejected below. As noted, the Sixth Circuit held differently only because of *Nevada v. Jackson*.

the adversary process" or risk irremediable "prejudice to the State." *Taylor*, 484 U.S. at 414-15. Indeed, Petitioner's notice would have been *timely* under the previous version of the Michigan rule at issue. *See People v. Merritt*, 238 N.W.2d 31, 32-33 (Mich. 1976).

Moreover, Petitioner's proposal for his alibi witness—to continue in his efforts to cooperate with the prosecution until the alibi witness was going to be called—would have mitigated any harm without delaying trial. If needed, a brief continuance would have amply alleviated any prejudice caused by Petitioner's four-day delay. In short, the Michigan court's decision cannot be squared with *Taylor*. *See Taylor*, 484 U.S. at 413-15. This Court's clarification of the *Taylor* standard—and, if nothing else, a confirmation that *Nevada v. Jackson* did not abrogate *Taylor*—would thus open the door to Petitioner prevailing on his underlying § 2254 claim.

CONCLUSION

The petition for certiorari should be granted or, alternatively, the Sixth Circuit's decision should be summarily reversed.

Respectfully submitted,

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